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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,
vs.
THE TAX COMMISSION OF OHIO, ET AL.,
Appellees.

BRIEF OF APPELLEES.

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STATEMENT OF THE CASE.

History and Issue.

This action was brought originally to enjoin the collection of nearly a million dollars in excise taxes assessed by the Tax Commission of Ohio against The East Ohio Gas Company for the years 1927, 1928 and 1929 for business done in Ohio in the local distribution of natural gas.

The disputed tax was based upon the estimated part of the total sales of gas made locally in various communities by The East Ohio Gas Company which represented the sale of gas purchased by the company from other companies outside of the state and delivered by such companies to The East Ohio Gas Company at the state line. The company admits the validity of, and has paid, the tax on that part of the total sales of gas estimated to have been made with gas which it itself produced in Ohio, but as to that part originating outside of the state, the company claims the tax to be invalid as a burden on interstate commerce. The state claims that the entire retail distribution business of the company is local in character and therefore subject to the tax. A statutory court, composed of Circuit Judge Smith Hickenlooper and District Judges Benson W. Hough and Robert R. Nevin, upheld the view of the state, and refused the injunction. The opinion of this court is found in the record commencing at page 59, and is reported in 43 Fed. (2nd), 170. The case is here on direct appeal.

The issue is whether the state of Ohio can levy an excise tax upon all the company's business of local natural gas distribution, although a part of the gas so sold was produced outside of the state of Ohio.

The Facts.

The appellant, The East Ohio Gas Company, which will hereinafter be referred to as "East Ohio", is an Ohio corporation engaged in the production, transportation and distribution of natural gas wholly within the state of Ohio (R., 27). The distribution is made to more than four hundred and fifty thousand local consumers in fifty municipalities in the northern and eastern parts of Ohio under local franchises, (R., 27).

A portion of the gas sold is obtained from East Ohio's own fields located in the state of Ohio. (R., 30.) During the years here in question East Ohio obtained approximately 72% of the gas which it distributed to Ohio consumers through contract with the Hope Natural Gas Company of West Virginia, such gas being produced in West Virginia and delivered at the state line into pipe lines owned by East Ohio. (R., 27, 28 and 29.) Approximately 3% of the total gas sold by East Ohio is secured in a similar manner from the Peoples Natural Gas Company of Pennsylvania. (R., 30.) The remaining 25% of gas sold in Ohio by the company is the result of its own production within the state. (R., 30.)

East Ohio, the Hope Company and the Peoples Natural Gas Company are almost wholly owned by the Standard Oil Company of New Jersey and were so owned at all times herein material. (R., 28.)

Certain of the communities served by East Ohio re-

ceive gas produced only outside of the state. By far the larger number of consumers, however, receive gas which is a mixture of West Virginia and Ohio gas. (R., 36, 37.) The West Virginia gas is, in most instances, brought to the city gate intact in the transmission lines under varying pressures of from two to three hundred pounds. (R., 29.) There at pressure reducing stations this is reduced to from thirty to fifty pounds, when it is fed into the high pressure mains of the local distribution system. It is in these high pressure mains that the Ohio gas is commingled with that brought from West Virginia. Throughout the local communities there are located a number of other regulator stations which again reduce the pressure to the requisite number of ounces at which it should be carried for domestic use and it then is conveyed in low pressure mains to the thousands of service pipes which connect with the individual consumer's premises. (R., 31.)

While there is no doubt a constant flow of gas through the main transmission lines of East Ohio from points outside the state, it is not true that there is no interruption in the flow of gas so far as the individual consumers served are concerned. The gas, when it reaches the premises of an individual consumer, flows into the service lines belonging to the consumer. It there becomes subject to the will of the consumer and, if he should not be using any of his appliances, the flow ceases and the gas becomes stationary in his pipes. The number of consumers in any given community is constantly changing, and new connections are constantly being made. It

is quite obvious that the gas which flows immediately from the low pressure main into the service line of a consumer was not brought from West Virginia pursuant to any contractual relationship between the company and that particular individual. (R., 31.)

In those communities which are served with a mixture of Ohio and West Virginia gas, the proportion of these two varies from day to day. In those communities which are served by interconnecting pipes with a mixture of Ohio and West Virginia gas (and these communities produce the major portion of the gross receipts of East Ohio), there is no way of ascertaining just how much Ohio gas is consumed in any particular community. (R., 38.) These communities have varying schedules of rates, although the average rate per thousand cubic feet in each community is approximately the same. The only method by which East Ohio claims to apportion its receipts as between West Virginia gas and Ohio gas is to determine the yearly amount of gas from Ohio and West Virginia, respectively, put into the general distribution systems, covering several communities, and arbitrarily apportion the gross receipts from all of these communities in like proportion. (R., 38.) Manifestly such apportionment, while perhaps a rough approximation, is by no means accurate.

It is to be observed also that East Ohio maintains in its rate schedules a service, and in some instances a minimum charge which must be paid monthly irrespective of whether any gas is used or not. By reason of these charges, payments are made by the consumers simply

because the company is ready to serve them and not because of any gas being furnished. (R., 32.)

In order to secure gas from East Ohio, individual domestic consumers are required to sign at the local offices of the company a contract which is in form set forth in full in the transcript of the record at page 32. The contract (1) is between two Ohio citizens, (2) is made in Ohio, (3) is performed in Ohio, and (4) does not specify whether the gas furnished by the company thereunder shall have its origin within or without the state.

Pertinent Ohio Law:—Ohio Levies Upon Natural Gas Companies an Excise Tax for the Privilege of Doing Business—the Tax Being Measured by the Receipts from Business Done Within the State.

The state of Ohio levies excise taxes upon practically all types of public utilities. These utilities are defined in Section 5416 of the General Code, and, so far as pertinent to the present issue, that section provides:

> "That any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:
>
> * * *
>
> When engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state, is a natural gas company;
>
> When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company; * * *"

By the terms of Section 5470 of the General Code, an annual statement to the Ohio Tax Commission is required of each utility and the succeeding section provides certain of the items which must be included in such report. Section 5474 provides as follows:

> "In the case of such public utilities * * * such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state * * * but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state."

Section 5475, General Code, then provides:

> "On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each * * * natural gas * * * company for business done within this state for the year then next preceding the first day of May, * * * excluding therefrom as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government."

After certification of the amount of the gross receipts to the auditor of state, the tax due is computed in accordance with the terms of 5483, which makes provision as follows:

> "In the month of October, annually, the auditor of state shall charge, for collection from each * * * natural gas * * * company, a sum in the nature of an excise tax, for the privilege of carrying on its

> intrastate business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

For accuracy, it must be borne in mind that the excise tax here involved is one imposed, in the words of Section 5416 of the Code, upon a company "engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state." An entirely different excise tax is imposed upon the transportation of gas, since the same section defines a pipe line company as a corporation "engaged in the business of transporting natural gas or oil through pipes or tubing either wholly or partially within this state." Thus it appears that in the taxation of natural gas companies, it was not the intention of the legislature to tax transportation, as such, although transportation necessarily forms a part of practically every type of business in commodities and so is incidentally involved in any business tax. The tax here is to be clearly distinguished from a direct tax upon transportation and it differs in no essential respect from the tax upon the ordinary transaction of barter and sale, whereby a commodity changes hands. The two businesses of transportation of natural gas and supplying gas to consumers are separated by the terms of the same statute.

It will thus be seen that Ohio levies an excise tax upon all public utilities engaged in the business of the local distribution of natural gas, which tax is based upon the gross receipts "for business done within this state," excluding therefrom the gross receipts of business done in interstate commerce and with the federal government.

Attorneys General Rulings.

During the years prior to 1927, East Ohio paid without question the excise tax upon all of its gross receipts. In that year, however, a former attorney general rendered an opinion that the excise tax under the provisions of the Ohio laws heretofore mentioned could not be assessed against an electric light company which purchased electricity in West Virginia and delivered it to consumers in Ohio. As a consequence, East Ohio continued to pay the tax on receipts from sales of Ohio produced gas, but refused to pay the tax upon its gross receipts from local sales to consumers within Ohio which it effected by the supply of gas which had its origin outside of the state.

In 1929 the present attorney general reversed the holding of his predecessor, advised the Tax Commission to assess the tax upon all business done by East Ohio wherever the source of the gas, and thereupon the commission took proper statutory steps to effect the collection of the proportion of the tax which the company failed to pay for the years 1927, 1928 and 1929. The action below was instituted to enjoin the state officials from enforcing the payment of the disputed tax, which amounts to the sum of $959,753.07.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. A state may validly levy an excise tax upon the business of a domestic public utility engaged in the local distribution of natural gas, based upon all of its gross receipts from such business, although a portion of the gas so distributed has its origin outside of the state.

Point B. Sales of natural gas from a citizen of one state to a citizen of the same state, under a contract which neither expressly nor impliedly provides that the commodity so sold is to be transported across state lines, do not constitute interstate commerce, even though a part of the gas furnished in performing the contract has its origin outside of the state.

POINT A.

THE BUSINESS OF LOCAL GAS DISTRIBUTION IS NOT INTERSTATE COMMERCE.

Decisions of the Supreme Court.

This court has categorically held that a company when engaged in a local gas distribution business is not engaging in interstate commerce even though the gas so sold originated outside of the state.

In the case of *Public Utilities Commission v. Landon*, 249 U. S., 236, the question before the court was the right

of the Kansas Utilities Commission to regulate the prices under which gas produced outside of Kansas was sold to consumers in Kansas. Gas was sold to the local companies by the receivers of the Kansas Natural Gas Company at wholesale and the case was one to enjoin the enforcement of local rates on the claim that they indirectly burdened interstate commerce. To all intents and purposes the physical situation was the same as that before the court here with the exception that the gas was delivered at the gates of the several municipalities in Kansas rather than at the state line. The lower court held that the action of the commission was a burden upon interstate commerce and allowed the injunction. The Supreme Court reversed this conclusion and held specifically that the business of the local companies in distributing gas received from the Kansas Natural Gas Company was wholly intrastate. In the opinion of the court, speaking through Mr. Justice McReynolds, appears the following:

> "But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage, by agent or otherwise, in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known

commercial methods. Rearick v. Pennsylvania, 203 U. S., 507, 512, 51 L. Ed., 295, 297, 27 Sup. Ct. Rep., 159; Pipe Line cases (United States v. Ohio Oil Co.), 234 U. S., 548, 560, 58 L. Ed., 1459, 1470, 34 Sup. Ct. Rep., 956. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains." (Boldface ours.)

While the Landon case dealt with the subject of rate regulation, it is clear that the same reasoning applies to the right of taxation, since the right of the state in either respect is predicated upon the fact that the business is not interstate in character. That the Supreme Court is still of the opinion that the law in the Landon case is sound, is evidenced by the reference to that case in the recent case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S., p. 300. That also was a rate controversy and the public utility had attempted, in evaluating its leasehold interests, to take into consideration the price received for gas produced. In denying the effect of this assumed earning capacity, Mr. Justice Stone gives the following reason:

"It is true that a part of the appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause (Pennsylvania Gas Co. v. Public Serv. Commission, 252 U. S., 23, 64 L. Ed., 434, P. U. R., 1920E, 18, 40 Sup. Ct. Rep., 279; Public Utilities Commission

> v. Landon, 249 U. S., 236, 63 L. Ed., 577, P. U. R., 1919C, 834, 39 Sup. Ct. Rep., 268), or for other reasons, and there can be no reasonable assumption that it will be."

It is apparent, therefore, that this court is firmly of the opinion that gas produced in one state may be subject to rate regulation when locally distributed in another state. It necessarily follows that such local distribution is not interstate commerce and is the subject of state taxation.

The Landon case, while the leading authority upon the point, is not the only instance in which this court has held the local distribution of gas to be not interstate commerce. In the later case of *Missouri v. Kansas Natural Gas Company*, 265 U. S., 298, this court reaffirmed and reiterated its conclusion in the Landon case. In this instance the right of the state to regulate the prices to be charged by the company transmitting the gas across the state line and selling to local distributing companies was challenged and denied. Inasmuch as this case clearly lays down the line of demarcation between what is interstate commerce and what is not, and further comments upon the case of *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S., 23, much relied upon by opposing counsel, we take the liberty of quoting from the opinion of the court, speaking through Mr. Justice Sutherland, commencing on page 308:

> "With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. Public Utilities Com-

mission v. Landon, supra, p. 245. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state, and before it had become part of the general mass of property therein. See Brown v. Houston, 114 U. S., 622, 634, 29 L. Ed., 257, 261, 5 Sup. Ct. Rep., 1091. There is nothing in Pennsylvania Gas Co. v. Public Service Commission, 252 U. S., 23, 64 L. Ed., 434, P. U. R., 1920E, 18, 40 Sup. Ct. Rep., 279, inconsistent with this view. There the gas company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said (p. 31): 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to the factories and residents as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.' The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon case, so far as this phase is concerned, differs only in the fact that

the process of division and sale to consumers was carried on, not by the supply company, but by independent distributing companies.

In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon case. **The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies."** (Boldface ours.)

The closing words of this quotation from the opinion of this court in *Missouri v. Kansas Natural Gas Co.*, we believe to be dispositive of the question at bar. East Ohio is in the "business of supplying, on demand, local consumers" (450,000); that is "local business even though the gas be brought from another state" (W. Va.) and "drawn for distribution directly from interstate mains."

It is further to be noted that *Missouri v. Kansas Natural Gas Co.* was decided after *Pennsylvania Gas Co. v. Public Service Commission* which is the authority chiefly relied upon by our opponents to support their theory that the business here involved is interstate.

Decisions of Other Courts.

Other courts than the Supreme Court have also reached a similar conclusion as to the characteristics of the business of local gas distribution.

In the case of *Galloway v. Bell*, 11 Fed. (2nd), 558,

decided in 1926 by the Court of Appeals of the District of Columbia, it is said:

> "The moment, however, that the gas is delivered to the Maryland company, the interstate movement ends. The conduct of the Maryland company in the distribution of the gas to its consumers is wholly intrastate and is subject to the control and authority of the state, acting through its public utilities commission. This is a matter, however, beyond the jurisdiction of the courts in the District of Columbia, or the district commission, to control. It is a question for the state, and not the federal authorities."

In this case this court denied a writ of certiorari, 271 U. S., 666.

Other cases holding that the local distribution of gas is not interstate commerce are:

Gas Company v. Towers (Md.), 106 Atl., 265.
Franke v. Supply Company, 70 Pa. Sup. Ct., 446.
Steel Company v. Supply Co., 70 Pa. Sup. Ct., 464.
Gas Company v. Commission, 70 Pa. Sup. Ct., 472.

Interstate Commerce Ended — "Original Package," "Processing," "Storage," "Commingling" Analogies Considered.

It is only by reason of a theoretical continuity of flow that opposing counsel in this case urge, as was also urged in each of the cases in which that theory has been denied controlling effect,—that the business of local gas distribution is interstate commerce. This theory breaks down in the light of the admitted facts in this record pertinent to the business of local gas distribution. While there exists a continuity of flow in the transmission lines, yet,

when the gas is taken through regulator stations which reduce its pressure and is then placed in thousands of mains under municipal streets to await the pleasure of the consumer, interstate commerce has ended. Four controlling factors which force this conclusion are (a) breaking of the bulk, (b) processing, (c) storage, and commingling. These will be discussed in their order.

Original Package.

(a) In certain of the cases reaching the conclusion that the business of local gas distribution is not interstate commerce, an analogy has been drawn to the "original package" theory. It has been held that metaphorically the package is broken when the gas arrives at the end of transmission lines and is there rendered fit for domestic consumption by being reduced in pressure with the resultant increase in volume, to be followed by a repetition of the process of reduction before it is sent through thousands of local mains to the service pipes of over four hundred and fifty thousand consumers, there to await the pleasure of the individual consumer.

A leading case expressing this idea is *State, ex rel. v. Flannelly*, 96 Kans., 372, and the remarks of the court in that case on pages 383 and 384 are particularly pertinent:

> "The original package rule will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. The gas, when sold, had become mixed with the common mass of property in this state by being so commingled with gas produced

here as to completely lose its identity. It is a matter of common knowledge that service pipes from the pipe lines of the distributing companies to private residences and other buildings belong to the owners of the property served, and installations are made at their expense. If the analogy of original packages, or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say, 'This came from another state, and has not yet become commingled with the mass of property in this state so as to make it a part of that property.'"

The remarks of the court in this case might well be applied to the present case, since the businesses are in all respects identical.

Processing.

(b) Another indication that interstate commerce has ceased is the fact that the goods are processed, so to speak, at the point of their entrance into the various local communities in order to make them suitable for use.

The gas when it comes across the state line is carried at a pressure of from two to three hundred pounds per square inch. Such compression is accomplished on the West Virginia and Pennsylvania sides and is rendered necessary in order to effectuate proper and economical

transportation. In such form the gas is unsuitable for use by domestic consumers. (R., 31.) In order to make the gas a commodity safe for use by consumers, it must be processed by reduction of pressure until it reaches the normal pressure utilized in service pipes. This process is described in the record and consists of regulators at the city gates, which reduce the pressure so that it is maintained in the high pressure distributing lines at from thirty to fifty pounds per square inch. Similar regulators are maintained between the high pressure and the low pressure distributing lines which reduce the pressure to the number of ounces necessary to make the gas satisfactory for consumption. (R., 31.) Manifestly, the gas delivered to the burner tips of the consumer is an entirely different commodity than that transported across state lines. By the release of pressure the bulk has been magnified a hundred fold. The commodity which reaches the city gates by means of interstate transportation, from then on undergoes a proccasing which results in the furnishing to the consumer of an entirely different commodity.

Storage.

(c) Further, there exists a strong analogy between the distribution system of East Ohio and storage facilities afforded in other types of businesses, such as warehouses and storage tanks.

This court is familiar with the characteristics of an ordinary local gas distribution system, such as is involved in this case. The municipalities in question are

covered with a vast network of distribution lines which are packed, so to speak, with gas to await the pleasure of the individual consumer. As heretofore pointed out, the flow is not constant in the individual service pipes. The consumer draws gas from the facilities of the gas company in accordance with his needs. The distribution lines may, accordingly, be appropriately described as a vast reservoir upon which, according to the terms of their contracts, the consumers are authorized to draw. A commodity placed in storage to await the demands of local sales ceases to be in interstate commerce.

Atlantic Coast Railway Co. v. Standard Oil Co., 275 U. S., 257.

Any one of these indicia might well be regarded as determinative of the fact that interstate commerce had ceased. Their cumulative effect leaves no doubt that local sales of natural gas made as detailed in this record do not constitute interstate commerce.

Commingling.

There is a further fact in this case which is of significance in determining when interstate commerce ceased. By far the greater portion of the gas produced outside of Ohio was so commingled with Ohio gas before it was sold that it is accordingly impossible to determine the gross receipts from the sale of the one type as distinguished from the other. The fundamental on this point was first expressed by Chief Justice Marshall in the case of *Brown v. Maryland*, 12 Wheat, at page 441, in the following language:

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving

—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

Again on page 443 the Chief Justice states:

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler." (Boldface ours.)

Ever since this decision, commingling with the common mass of property within the state of a commodity transported in interstate commerce has always been regarded by this court as a strong indication of the fact that interstate commerce has ceased.

Moreover, *Brown v. Maryland* dealt with a property

tax, while here the question relates to an excise tax only. No attempt is made to tax the gas as such. It is merely a tax measured by gross receipts from local business, levied for the privilege of conducting such a local business.

This court might well apply to this case some of the reasoning used in the recent case of *Western Cartridge Co. v. Emmerson*, 281 U. S., 511. It was there held that no direct burden upon interstate transportation of commodities resulting from the franchise tax assessed upon the cartridge company. Mr. Justice Butler pointing out in the course of the opinion that the exaction might rise while the sales to customers outside of Illinois declined, and, conversely, might fall while such sales increased. In the present case, although interstate commerce enters into the transportation of the gas by reason of its transportation across the state line pursuant to the agreement with the West Virginia and Pennsylvania concerns, yet the local distribution, consisting of the processing of the gas to a condition suitable for use, its storage to await the needs of the consumers, its piecemeal parceling out, the making of innumerable local contracts in the various Ohio municipalities for the purchases of such gas and the furnishing of all the facilities incident to gas distribution and necessary to a fulfillment of those contracts,—is all local business carried on in Ohio, and, furthermore, these details are common to all of the "goods" which the company distributes, whether they originate in Ohio or elsewhere.

The tax in no way depends directly upon the amount

of the taxpayer's interstate purchases in the fulfillment of its local contracts, which are the basis for the determination of the tax imposed. Whatever the source of supply of gas, whether it be West Virginia or Ohio, the tax remains constant when local sales are constant. Applying the test in the Emmerson case here, the conclusion is clear that the business done is local in character and the burden of the tax is not cast directly upon that portion of the appellant's entire business which involves interstate transportation of the gas. That ceases before the Ohio activities which are the subject of the tax begin.

Similar Types of Business Not Interstate Commerce.

The treatment accorded by this court to local businesses of like character is also persuasive. In the recent case of *Atlantic Coast Railway Company v. Standard Oil Company*, 275 U. S. 257, the court had under consideration the claim of the railroad company that certain shipments made by the oil company from storage tanks located at Tampa and Jacksonville, Florida, were interstate in character, since the gasoline and oil contained therein were shipped from outside of the state and were stored by the oil company in the tanks merely for convenience and distribution. The court, however, reached the conclusion that shipments from storage tanks to points within the state of Florida were intrastate in character. In commenting upon the oil company's business, the court, speaking through Chief Justice Taft, says on page 269:

> "The important controlling fact in the present controversy, and what characterizes the nature of the

commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard has anything to do with the determining what the ultimate destination of the oil is, or has any interest in it, or any duty to discharge in respect to it, except that the railroad company, after the storage in Florida has been established for the purposes of the plaintiff company, accepts the duty of transporting it in Florida to places designated by the plaintiff company.

"The compensation for the transportation of the oil through the pipe lines from the steamers to the storage tanks or to the storage tank cars, and the

transportation of those cars to the seaboard storage tanks of the plaintiff, is not here in question, and we are not asked to determine whether such delivery to the storage tanks and cars on the seaboard from the steamers are interstate or foreign commerce.

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

It is interesting to note the more detailed treatment of this case in the district court, reported as *Standard Oil Company of Kentucky v. Atlantic Coast Line*, 13 Fed. (2nd), 633. Peculiarly apt language is found in the opinion of the court on page 641 as follows:

"In determining the essential character of the movement, it is important also to remember that, notwithstanding the fact that this product is sold before it starts from Tampico, no particular part of the cargo is destined or intended for any particular purchaser, nor for delivery at any particular place beyond the ports, at any particular time, and, while it is true that all of the oil is of the same grade, yet, when the time comes to make delivery to the contract purchasers, a separation from stock is just as essential as in the case of a hardware merchant, who must select, from a stock of shovels exactly alike, the shovels he has sold to a retail merchant.

"Much is made of the alleged practically continuous flow of oil from ship to storage tanks, from storage tanks to tank cars, and thence to the bulk stations and consumers, and the movement is painted as a continuous flow of oil in interstate commerce, through the tanks, to ultimate destination. Conceding the premise, we are again reminded that continuity of movement is not the test in determining the character of the movement. On this particular contention of the defendant the case of Public Utilities of Kan-

sas v. Landon, 249 U. S., 236, 39 S. Ct., 268, 63 L. Ed., 577, is illuminating. In that case the court held that, while piping natural gas from one state to another, and there delivering it to independent local gas companies, is interstate commerce, the movement of the gas by the local companies from the point where they receive it from the pipe line company to their local consumers is intrastate commerce, and not a continuation of the interstate movement, even though the mains of the local companies are permanently connected with those of the pipe line company, and there is no interruption of the flow of the gas from the pipe lines to the mains of the local companies."

It was this reasoning which was approved and followed in the opinion of Chief Justice Taft, from which we have quoted.

A similar process of reasoning forces the same conclusion in the case at bar. The gas produced in West Virginia and Pennsylvania is not, when it crosses the state line, earmarked or ticketed for any particular consumer. It is sent in to meet the demands of East Ohio for service within the several communities in which it does its business of local gas distribution. It is entirely immaterial to the consumer from what source his gas comes. He has made no contract whereby he is to receive West Virginia or Pennsylvania, as distinguished from Ohio, gas. He has merely applied locally and has signed the usual application blank at the local office and been permitted to attach his service line to the local main. The company has no means of knowing what, if anything, the consumer will use, and it is only at the end of the usual monthly

period, when the meter on the consumer's premises is read, that the amount of gas is ascertained. Certainly the gas handled in this manner was not brought across the state line pursuant to any express contract with the individual consumer calling for such transportation. The interstate commerce ceased when the gas was delivered by the East Ohio at the city gates and its business thereafter was purely local in character. It is immaterial that the same corporation does both the transportation and the distribution. This court has so often decided that the mere intervention or non-intervention of different corporate entities in the course of a particular transaction does not change the character of the transaction that no citation of authority is deemed necessary.

In the case of *Wagner v. City of Covington*, 251 U. S., p. 95, the right of Kentucky to impose a license tax upon peddlers was involved. There the peddler was bringing soft drinks into the state and carrying his supply from one retailer's place of business to another, soliciting and negotiating sales, and it was urged that the articles were delivered in their original packages and therefore the transaction amounted to interstate commerce. Upon this point the court, speaking through Mr. Justice Pitney, says on page 103:

> "Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the

state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original package or not."

See also *State, ex rel. v. Knight*, 192 U. S., 21.

So in this case, so far as the local sales of gas by East Ohio are concerned, the gas might just as well have been produced in Ohio as in West Virginia or Pennsylvania.

Cases in accord with the foregoing authorities are:

Myron Green Cafeteria Co. v. Kansas City, et al., 293 Mo., 519.

H. P. Hood and Sons v. Commonwealth, 235 Mass., 572.

Ward Baking Co. v. Federal Trade Commission, 264 Fed., 330.

In each of the foregoing cases interstate transportation was involved, but in each the retail sales made were held to be local and in no way in the nature of interstate commerce.

Conclusion.

No more comprehensive description of the various attributes compelling the conclusion that interstate commerce had ceased when the retail sales were made can be found than that of the statutory court in this case (R., 61) and we therefore conclude this portion of our brief by quoting the following:

"So simplified and considered, we are constrained

to the opinion that the petitioner's business, which was subjected (fol. 85) to the excise tax, was a local or intrastate business which might properly thus be taxed. Public Utilities Comm. v. Landon, 249 U. S., 236; Missouri v. Kansas Natural Gas Co., 265 U. S., 298. Not only does the language employed by the Supreme Court in these two cases aptly and comprehensively cover the present issue, but all other indicia of the true character of the business point in the same direction. Thus bulk must be considered as broken when the gas passed from the great gas transportation lines into the network of smaller distributing lines, in analogy to the original package doctrine; the interstate journey must be considered as ended when the gas is placed in proper containers, be these tanks or low pressure distribution system, for delivery to local trade, in analogy to the storage cases (Atlantic Coast Line v. Standard Oil Co., 274 U. S., 257, 269); the gas must be considered processed and modified in an essential characteristic when its pressure is so reduced as to make it available for consumers' use, if analogy to the processing of goods, as breaking the interstate journey, be drawn; and, so far as the relationship between the company and consumer is concerned, it makes no difference whatever to the latter whence comes the gas. The trade was essentially local. The transportation of the gas from West Virginia was but a preparation for it. Wagner v. City of Covington, 251 U. S., 95, 103."

POINT B.

Sales of Natural Gas From a Citizen of One State to a Citizen of the Same State, Under a Contract Which Neither Expressly Nor Impliedly Provides that the Commodity So Sold Is to Be Transported Across State Lines, Do Not Constitute Interstate Commerce, Even Though a Part of the Gas Furnished in Performing the Contract Has Its Origin Outside of the State.

It is essential to a full understanding of the case that the contracts under which sales were made should be constantly borne in mind.

The contract in each instance is in form substantially as set forth on page 32 of the record. There is here no commitment on the part of the company to furnish gas from outside of the state of Ohio. The consumer is not interested in the source of the gas, and his necessities may be supplied by natural gas from any source. The company could at any time abandon its foreign source of supply and furnish gas produced within Ohio without violating any term of the contract. The means whereby the company fulfilled the obligations of its contract to furnish gas were entirely within the discretion of the company, and the consumer had no interest therein.

Moreover, the commodity purchased was not of such a character that it could be produced only beyond the

borders of the state of Ohio, in which event there might possibly be implied the obligation to transport in interstate commerce. East Ohio itself is a large producer of gas in the state of Ohio and there is no showing in the record of the impossibility of producing or purchasing within the state gas sufficient to serve all of the needs of the consumers of the company. Quite obviously there is nothing either in the contract itself or in the nature of the commodity purchased which requires transportation of gas in interstate commerce. Under such circumstances, the act of the company in choosing to perform its contract by the use of gas produced outside of the state of Ohio cannot convert a purely local transaction into interstate commerce.

It must be borne in mind that Ohio is not here seeking to impose a tax upon the sale from the Hope Natural Gas Company to East Ohio. That question is not involved. The existence of the contract between the producing company and East Ohio is of no materiality in determining the status of the contract between East Ohio and its consumers, at least in the absence of specific recognition of the existence of that contract in the agreements with the consumers.

A long line of decisions of this court substantiate the position hereinabove stated. Utilizing as his authority many of the cases hereinafter referred to, Cooley, in his work on taxation, 4th Edition, at pp. 802-803, states:

> "There can be no interstate commerce unless as a part of the transaction there is in contemplation some act of transportation between two or more

states. In determining whether a commercial or trading business is interstate, the place where the contracts are made or where the title passes are not decisive. A state stamp tax law, such as a tax upon transfers of stock, does not violate the commerce clause, so far as the tax is imposed on transactions wholly within the state, because they affect property outside the state or because one or both of the parties previously came from other states. A state tax on persons engaged in buying and selling cotton for future delivery, where interstate shipments are not required, is valid, since such contracts are not subjects of interstate commerce. Parties cannot by a non-essential contract, convert an exclusively local business subject to state control into an interstate commerce business protected by the commerce clause so as to remove it from the taxing power of the state. Where the sale of an article manufactured in another state is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture nor because the purchaser obtains a warranty direct from the manufacturer."

One of the leading cases decided by this court on this point is that of *Ware & Leland v. Mobile County*, 209 U. S., p. 405, which involved a state tax upon the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery. The law was attacked upon the ground that deliveries might be involved which would comprehend transportation in interstate commerce. With respect to this contention, Mr. Justice Day states on page 413 as follows:

"When the delivery was upon a contract of sale made by the broker, the seller was at liberty to ac-

quire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation to do so. In neither class of contracts for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

This reasoning is equally applicable in the instant case where the contract between the East Ohio and the consumer might or might not be carried out by the interstate transportation of gas.

An even stronger case is that of *Banker Bros. Co. v Pennsylvania*, 222 U. S., 210, in which a tax of the state of Pennsylvania, upon sales of retail vendors of automobiles, was attacked upon the ground that the sales were made in interstate commerce. The dealer in question had the sales agency of the manufacturer of Pierce-Arrow cars, which was a New York concern, its only manufacturing plant being located in Buffalo. Only demonstrating cars were kept in stock and the order blanks con-

tained an agreement to pay the list price "f. o. b. factory." It was urged that the sale was an interstate transaction between the manufacturer and the purchaser and that the dealer acted merely as agent for the delivery and collection of the purchase price. Mr. Justice Lamar, in delivering the opinion of the court, makes short shrift of this contention, his conclusions being expressed in the following language found on pp. 213, 214, of the opinion:

> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburgh purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
>
> The name of the Pierce company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburgh a warranty from the manufacturer direct.
>
> These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburgh, who was not concerned

with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel and Wire Co. v. Speed, 192 U. S., 500, 48 L. Ed., 538, 24 Sup. Ct. Rep., 365; American Exp. Co. v. Iowa, 196 U. S., 147, 49 L. Ed., 423, 25 Sup. Ct. Rep., 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

Again, in the case of *United States Fidelity and Guaranty Company v. Kentucky*, 231 U. S., p. 394, a license tax upon persons engaged in the business of inquiring into and reporting on the credit and standing of persons engaged in business in Kentucky was involved. Here also appeared the contention that there was an interference with interstate commerce and that interstate commerce was being attacked. In respect thereto, Mr. Justice Pitney states on page 399 as follows:

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. Ficklen v. Taxing Dist., 145 U. S., 1, 36 L. Ed., 601, 4 Inters. Com. Rep., 12 Sup. Ct. Rep., 810. Or the business of the live stock exchange that was under consideration in Hopkins v. United States, 171 U. S., 578, 592, 43 L. Ed., 290, 296, 19 Sup Ct. Rep., 40. Or the business of a cotton broker dealing in futures or options. Ware v. Mobile County,

209 U. S., 405, 52 L. Ed., 855, 28 Sup. Ct. Rep., 526, 14 Ann. Cas., 1031.

To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

We also refer the court to the case of *Blumenstock Bros. Advertising Company v. Curtis Publishing Company*, 252 U. S., 436, where the authorities are fully reviewed and approval of the rule stated in the foregoing cases given.

Lastly, we call to the attention of the court the case of *Moore v. United States Cotton Exchange, et al.*, 270 U. S., 593, which was a bill brought to compel the furnishing to the complainant of trade quotations, federal jurisdiction being invoked on the ground that there was a violation of the anti-trust laws of the United States. As this point required a determination of the character of the business of the New York Cotton Exchange, the court, speaking through Mr. Justice Sutherland, made the following comments:

"The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another.

If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland v. Mobile County, 209 U. S., 405, 412, 413, 52 L. Ed., 855, 859, 28 Sup. Ct. Rep., 526, 14 Ann. Cas., 1031. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Engel v. O'Malley, 219 U. S., 128, 139, 55 L. Ed., 128, 137, 31 Sup. Ct. Rep., 190. See also Hopkins v. United States, 171 U. S., 578, 588, 590, 43 L. Ed., 290, 294, 295, 19 Sup. Ct. Rep., 40; Anderson v. United States, 171 U. S., 604, 615, 616, 43 L. Ed., 300, 305, 306, 19 Sup. Ct. Rep., 50."

Conclusion.

These authorities lead inevitably to the conclusion that the sale of natural gas by East Ohio to its hundreds of thousands of consumers in Ohio, which sales are pursuant to contract made in Ohio—to be performed in Ohio—and without any specification that the gas is to come from any particular source—constitutes local business, on the privilege of doing which Ohio may levy an excise tax without violating the interstate commerce clause of the Constitution.

AUTHORITIES RELIED UPON BY OPPOSING COUNSEL.

The appellant grounds its contention primarily upon expressions of this court found in *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S., 23, and *Peoples Gas Company v. Public Service Commission*, 270 U. S., 550.

In the consideration of the former case it is important to bear in mind just what was involved and what the real conclusion of the court was. The Pennsylvania Gas Company was a corporation organized under the laws of the state of Pennsylvania and transported gas from its source of supply in the state of Pennsylvania into the state of New York and there delivered it to consumers in the city of Jamestown, as well as other points. The specific question involved was whether the Public Service Commission of New York had the power to regulate rates for gas sold to consumers in Jamestown. The opinion by Mr. Justice Day is susceptible of the interpretation that the whole transmission was one in interstate commerce, but the conclusion is reached that, since Congress had not acted, the matter of local rate regulation could be undertaken by local authorities without directly burdening interstate commerce. One essential distinction between that case and the one here for consideration is that the Pennsylvania Gas Company was a foreign corporation producing in Pennsylvania, transporting to New York and there distributing, gas. Here East Ohio may be aptly described

as a large type of local distributing company. Instead of receiving the gas at the city gates, it extends its lines and receives certain of its gas at the state line. Whether its connection with the pipe line of The Hope Natural Gas Company existed at the city gate or at the state line is, we respectfully submit, of neither practical nor legal significance. Thus considered, the present case comes precisely within the language of Mr. Justice McReynolds heretofore quoted from the case of Public Utilities Commission v. Landon, supra. It is also clearly within the language of Mr. Justice Sutherland in the case of *Missouri v. Kansas Natural Gas Company*, supra.

Two essential distinctions exist, therefore, in that East Ohio is an Ohio corppration and does not produce gas outside of the state, whereas the Pennsylvania Gas Company was a foreign corporation producing gas outside of the state of New York.

Aside from these controlling distinctions, we invite the attention of the court to the fact that the ultimate conclusion of the case was that the state might lawfully regulate local rates. This in no way militates against our contention here that the state of Ohio may likewise assess upon this company for local business a reasonable excise tax no different in amount than that which it assesses against all corporations of similar character.

The other case most relied upon by opposing counsel is that of *Peoples Gas Company v. Public Service Commission*, 270 U. S., 550. In this case it is also important to bear in mind just what the facts were. The Peoples Na-

tural Gas Company brought the action to contest the validity of an order of the Public Service Commission of Pennsylvania, requiring it to continue to supply gas to a local distributing company at Johnstown, Pa. A large portion of the gas which it furnished to the local company was transported by it from the state line, where it was received from the line of a producing company in West Virginia. The real question before the court was whether the company was engaged in interstate commerce, in view of the fact that it itself did not actually bring the gas into the state but purchased it at the state line. It was conceded, of course, that, aside from this additional factor, the business must be regarded as interstate under many earlier decisions of this court, notably the Landon case, heretofore discussed. The court concluded that the transmission of the gas to the distributing company at Johnstown was interstate commerce, irrespective of the fact that the gas was purchased at the state line. It did not, however, hold, nor was the question before it, that the local distributing company in Johnstown was engaged in interstate commerce.

The principles of that case applied to the case at bar would only extend to holding interstate that portion of the business of East Ohio which comprehends the transportation of the gas from the state line to the gates of the various municipalities which it serves. With this conclusion we have no present quarrel. So, when Mr. Justice Van Devanter speaks on page 554 of the transportation of the gas to the place "of consumption in the

other" state, he was speaking of the point of delivery to the Johnstown company and not to the ultimate consumers of the gas.

Of like effect is another case relied upon by opposing counsel, viz., *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U. S., 83. This likewise was a question involving purchase at the state line and delivery to a local distributing company for ultimate distribution, the only distinction being that the commodity here involved was electric energy. We have no quarrel with the conclusion of the court in the Attleboro case, since it deals solely with the character of the business of a company selling wholesale to distributing companies which do a local business. In fact, we are in accord with the principles therein announced that the corporate entities involved in a particular transaction do not constitute a legitimate ground of differentiation of that which is interstate and that which is intrastate in character. Applying this principle, it necessarily follows that a company engaged both in the transportation of gas and the distribution thereof locally to consumers is engaged in two types of business, which are distinct and must, under the interstate commerce clause, be separately treated. As is stated in the Attleboro case, on page 90:

> "The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the

power of the state because this may be the smaller part of its general business."

By like process of reasoning, the state may legitimately tax the intrastate distribution business of East Ohio, although that company is also engaged in the business of transporting gas.

We have no quarrel with the cases of *New Jersey Bell Telephone Company v. State Board of Taxes and Assessments*, 280 U. S., 338; *Port Richmond Ferry v. Hudson County*, 234 U. S., 317, or *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S., 333, which are cited by opposing counsel. Each of these cases involved transactions clearly interstate in character. When a telephone subscriber calls a point outside of the state, clearly it is within the contemplation of both the subscriber and the company that interstate business is being transacted.

Likewise, in the case of ferrying across a river from one state to another, there can be no question of the intent of the parties concerned to contract with respect to transportation of persons and property across state boundaries. This distinction renders unnecessary further comment upon these cases.

Much stress is placed upon the decision reached by Judge Cardozo in the case of *People, ex rel., Pennsylvania Gas Company v. Saxe*, 229 N. Y., 446. The same point of distinction exists here as was indicated with respect to the case of Pennsylvania Gas Company v. Public Service Commission, supra. The tax was imposed upon a foreign corporation bringing its own gas, produced outside of New

York, into that state and distributing it locally. The analysis which the learned judge makes of the business of local gas distribution is, however, we respectfully submit, erroneous. Moreover, the all-important factor of the precise contractual relationship involved is absent from that case.

East Ohio's four hundred and fifty thousand consumers make contracts locally with an Ohio corporation, at local offices maintained in the several Ohio communities in which it supplies its gas. All the attributes of the business, which the court will bear in mind are vastly more than the mere transmission of gas, and include the exercise of local franchises, the maintenance of local offices, the adjustment of facilities, the exaction of service or minimum charges, etc., are purely local in character, hence this case stands upon an entirely different basis than that before the New York court.

The interstate transportation in the case here is purely incidental and antecedent to the fulfilment of the local contract with the consumer and in nowise characterizes those contracts as interstate commerce so as to preclude the imposition of the tax here in question. *Wagner v. City of Covington*, supra.

THE TAXING STATUTE HERE INVOLVED IS BROAD ENOUGH TO COVER THE BUSINESS OF APPELLANT.

Some suggestion is made by opposing counsel that, conceding the business of appellant to be so localized as to subject it to both taxation and regulation, nevertheless the pertinent sections of the Ohio Code specifically exclude such business from the burdens of the tax.

It is submitted that an examination of the language and history of the pertinent sections of law effectively disposes of any such contention.

Originally, the excise tax here under consideration was assessed upon "the gross receipts" of the various utilities "for business done within the state of Ohio." Following the decision of this court in the case of *Galveston Railway Co. v. Texas*, 210 U. S., 217, which was rendered in 1908, the legislature amended these laws so as to exclude the type of business from its provisions which this court said the state was powerless to tax. This amendatory provision was enacted in 1910 and imposed a tax upon the privilege of doing "intrastate business," and specifically excluded receipts from "interstate business." The action here is to protect the company from an alleged violation of federal constitutional rights. While this court can, and will doubtless, take complete jurisdiction of a case and interpret a state statute, once its jurisdiction is properly invoked, yet it is respectfully urged that a reason-

able and proper interpretation of the pertinent sections of the Ohio law is that a tax is levied upon all business of supplying natural gas to consumers within Ohio over which that sovereignty has jurisdiction. The manifest intention was to exclude only that which must of necessity be excluded, for otherwise there would arise a discrimination against domestic commodities—a result which certainly cannot be fairly imputed to the Ohio legislature.

Accordingly, if this court should perchance be of the opinion that the business here in question, while localized in character, has certain attributes of interstate commerce, which we most earnestly deny, and should at the same time be of the opinion that a fair and non-discriminatory tax upon this type of business is sustainable, there can be no question but that the tax is assessed by the pertinent Ohio laws.

CONCLUSION.

Our opponents here seek to have this court extend the implied inhibition of the interstate commerce clause of the Constitution far beyond its boundaries as set by decisions of this court. It is not amiss, therefore, to advert to the fundamentals upon which this provision of the Constitution is based and to point out the logical consequences to the states, both economically and governmentally, which would result from accepting opponent's position.

By the adoption of the federal Constitution the states

surrendered to the Federal Government certain powers of sovereignty, so far as that surrender was deemed essential for the general welfare. The grant to Congress of the power to regulate commerce among the states has been held to negative the right of the states to place such a burden upon that commerce as would tend to restrict free intercourse. The broad purpose was that a state should not stand at its boundary line, so to speak, and collect toll for the privilege of bringing commodities from other states within its boundaries. Thus in the instant case Ohio could not lawfully impose a tax upon the Hope Natural Gas Company for the privilege of selling its gas to East Ohio Gas Company; nor could Ohio lawfully impose a tax upon East Ohio for the right to bring in gas from other states. No such effort is here made. The transactions of East Ohio in purchasing from the Hope Natural Gas Company and of transporting gas from West Virginia are not the objects of Ohio's taxation.

On the other hand, a property tax may be properly assessed upon commodities which have been transported in interstate commerce once they attain a taxable situs within the state. Similarly, an excise tax upon transactions between citizens of the same state is legitimate, although the commodities involved originate beyond the state boundary, for business may be localized as well as the property itself.

Opponent's position has the effect not only of extending the interstate commerce clause beyond its governmental purposes but also of using it as an instrument causing

economic loss to the individual states. If the local business of East Ohio done with gas it brings from West Virginia be not subject to the excise tax, while at the same time the local business of Ohio producers of natural gas, and indeed the local business of East Ohio itself done with Ohio gas, be subject to the tax,—then the economic result to Ohio is that domestic production of natural gas would be discriminated against. The only alternative would be to permit all business of local gas distribution to escape the burden of taxation, thus freeing a vast and profitable enterprise whose properties and activities are protected locally and whose earning power is substantially guaranteed by state regulation, from bearing its legitimate part of governmental expense. Companies, such as East Ohio, doing a local gas distribution business in fifty municipalities and with over four hundred and fifty thousand customers—obtain their right to do business through local franchises—they occupy the streets owned by the public—they are assured a fair return upon the value of their property under local laws, and their property is safeguarded by local authorities. All this is at local expense. Is it possible that the sovereign from which they derive the necessary power to carry on the business of local gas distribution has not the correlative power to impose a tax, fair in amount and non-discriminatory, through which these companies may be compelled to contribute their fair share of the cost of that local government? To ask the question is to answer it. Nor can the answer be that the sovereign state must

either lose the tax or discriminate against its home pr
duced commodities!

There is another aspect of opponent's thesis of eve
deeper governmental significance. Modern engineerin
developments now make possible the long distance tran
portation of electrical energy in high voltage transmi
sion wires; of oils in pipe lines; of gas in transmissio
mains. Science has hurdled state lines. Further, moder
financial methods make possible the concentration of va
financial resources which permit billion dollar corpora
tions to do a country-wide business. If this court shoul
adopt opponent's position and should tie together th
engineering and the financial developments of moder
America so that business in these great underlying com
modities of power, oil and gas remained interstate com
merce from point of origin to point of final consumptio
then the original gift, so grudgingly bestowed by th
states on the national government, of the power t
regulate interstate commerce would indeed become
quit-claim deed to half the sovereignty of the individua
states! The true answer has, we contend, already bee
given by this court in the Landon and the Missouri case
that answer is found in the language of the court, speak
ing through Mr. Justice McReynolds and Mr. Justic
Sutherland, respectively: "Interstate commerce is
practical conception and what falls within it must be de
termined upon consideration of established facts an
known commercial methods." "The business of sup
plying, on demand, local consumers, is a local busines
even though the gas be brought from another state an

drawn for distribution directly from interstate mains. * * *"

The taxes levied in the case at bar are excise taxes upon the privilege of doing business in Ohio. East Ohio, in supplying its four hundred and fifty thousand consumers, does it pursuant to local franchises through distribution mains in local streets, and contracts for the commodity are made locally between East Ohio and its Ohio customers. The subject matter of the contract is gas, with no mention of its source, which can and is being supplied by East Ohio from either Ohio or West Virginia. Such business is local business. The claimed physical continuity of flow upon which opponents hinge their case does not in fact exist. The gas, after being brought through the high pressure transmission mains, lies in the distribution system and in the service lines of the consumers awaiting the pleasure of the individual consumers. But even that claimed continuity of flow has been held by this court to be not decisive. It gives to the transaction merely an aspect of interstate commerce which is antecedent to and incidental to the local business which is really the subject of the excise tax. This local distribution business is done after the commerce "in its essentially national aspect has come to an end."

The decision of the court below should be affirmed.

Respectfully submitted,

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